NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Yonkers Racing Corp. d/b/a Empire City at Yonkers Raceway and Law Enforcement Employees Benevolent Association and Local 971/550 NSOBA. Case 2-AO-00001

May 24, 2010

ADVISORY OPINION

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER AND BECKER

Pursuant to Sections 102.98 and 102.99 of the Board's Rules and Regulations, on October 26, 2009, the New York State Employment Relations Board (NYSERB) filed a petition for an Advisory Opinion as to whether the Board would assert jurisdiction over the operations of Yonkers Racing Corp. d/b/a Empire City at Yonkers Raceway (the Employer). In pertinent part, the petition alleges as follows:

- 1. Representation petitions (SE-60135 and SE-60153) are currently pending before NYSERB.¹
- 2. The Employer and the Unions involved, Law Enforcement Employees Benevolent Association and Local 971/550 NSOBA (the Unions) and OPEIU Local 153 (the incumbent Union), have taken opposing positions concerning whether the National Labor Relations Board (the Board) has jurisdiction over the Employer. NYSERB seeks an advisory opinion as to whether the Board will assert jurisdiction over the Employer under the facts as found in the hearing officer's report, and adopted by NYSERB. NYSERB's factual findings are as follows:
 - a. The Employer is located at 830 Yonkers Avenue, Yonkers, New York 10174. Yonkers Raceway has operated as a horse racing track since 1899. NYSERB has exercised jurisdiction over the Raceway for many years, pursuant to the NLRB's policy of declining to exercise jurisdiction over racetrack operations. The Rooney family has owned and operated Yonkers Raceway since 1972, and did so as of October 21, 2009, the date NYSERB adopted the hearing officer's findings and recommendations.²

¹ Unfair labor practice charges filed by the incumbent Union (Cases SU-60136, -60138, -60139, and -60140) are being held in abeyance pending the resolution of the issue of jurisdiction.

- b. In 2005, the Raceway was closed temporarily for the construction of a new gaming operation, after the State of New York passed legislation authorizing video lottery terminals (slot machines) at the Raceway. Casino construction consisted of renovating 2 of the 6 floors of the clubhouse to house 2000 slot machines, and constructing a single-story building dedicated to the casino, food courts, entertainment lounge, and other facilities. The casino currently has 5300 slot machines, and the New York State Lottery Division regulates the casino operation.³
- c. In 2004, the Raceway had revenues of \$28 million. The casino opened in 2005. In 2008, the Raceway had revenues of \$23 million, and the casino had net revenues of \$156 million.
- d. Prior to 2005, the Raceway employed 205 people. Currently, there are 1300 full-time and part-time employees employed at the facility (racetrack and casino combined). The majority of the employees work on both sides of the operation. The casino employs approximately 170 individuals exclusively and the racing operation employs approximately 89 employees exclusively.
- e. The unit in question is as follows: "[a]ll regular full-time and regular part-time Special Police Officers, Peace Officers, Security Officers, Sergeants and Lieutenants employed by the Employer." In 2004, the racetrack employed approximately 35–40 of such peace officers. In 2008, there were 135 peace officers at the Raceway. Peace officers can be assigned to either or both the racing and casino operations. Twenty-three peace officers work consistently on the casino side and twelve work consistently on the racing side.
- f. With respect to the levels of attendance at Yonkers Raceway, in 2004, the Raceway had approximately 354,000 customers. In 2008, after the casino opened, the combined operations had approximately 4.5 million customers.

Board as part of the petition. Thus, for the purposes of this Advisory Opinion, we take the facts as found there to be accurate as of the date the report was served. Throughout this Opinion, all references to the present (e.g., "today") will refer to NYSERB's findings of the facts as they existed on Oct. 26, 2009, the date that NYSERB submitted the petition to the Board.

NYSERB's petition did not attach position statements from any party, and no party has filed a brief with the Board.

² The NYSERB hearing was held before Hearing Officer Edwin Stahr on August 27, 2009. NYSERB'S Decision and Order noted that no exceptions were filed to the report, adopted the hearing officer's findings and recommendations, and certified the record submitted to the

³ In 2007, pursuant to a stipulated election, the NLRB issued a certification of a unit consisting of video game machine attendants and promotion booth representatives of the Employer. The Board's jurisdiction was not contested in that proceeding.

- g. With respect to the hours of operation at Yonkers Raceway before and after the casino operations opened, between 1972 and 2005, the Raceway operated 5 nights a week from 5 until 11:30 p.m., and was open each month of the year, weather permitting. Today, the casino is open from 10 until 2 a.m. every day of the year, and the racetrack operates 5 nights a week each month of the year, weather permitting. Before the opening of the casino, simulcasting was open from 11 a.m. until 11:30 p.m., 5 days a week. Now simulcasting is open 7 days a week at hours determined by the availability of racing at tracks that provide simulcast signals to the Raceway.
- h. With respect to the relationship between the race-track and the casino, New York State law would not allow video lottery terminals at Yonkers Raceway without the racetrack; therefore, the casino is dependent on the racetrack for its existence. Without the casino, Yonkers Raceway would undergo a significant decline in attendance, revenue, and employees. The hearing officer found that "[i]t is not evident from the testimony and evidence whether Yonkers Raceway would cease operations without the casino."

As noted above, the Employer and the Unions have taken opposing positions regarding Board jurisdiction over the Employer's operations. The Unions filed representation petitions with NYSERB, requesting an investigation into a representation question and that NYSERB certify the representative, if any, selected by employees in the above-described unit of peace officers. The Employer has objected to NYSERB's exercising jurisdiction. It contends that the nature of its business has changed to the point that the Board's policy of declining to assert jurisdiction over racetracks no longer applies.⁴

Section 102.98 of the Board's Rules and Regulations governs the Board's consideration of advisory opinions and provides, in relevant part:

Whenever an agency or court of any State or territory is in doubt whether the Board would assert jurisdiction over the parties in a proceeding pending before such agency or court, the agency or court may file a petition with the Board for an advisory opinion on whether the Board would decline to assert jurisdiction over the parties before the agency or the court (1) on the basis of its current standards, or (2) because the employing enterprise is not within the jurisdiction of the National Labor Relations Act. [Emphasis added.]⁵

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having duly considered the matter, and based upon the facts as found by NYSERB, the Board is of the opinion that it would not decline to assert jurisdiction over the Employer's operations.

As set out above, the Board's Rules allow for the issuance of advisory opinions in narrow circumstances, i.e., only in response to a petition by a State or territory raising jurisdictional questions. The Board's advisory opinion proceedings under Section 102.98(1) "are designed primarily to determine whether an employer's operations meet the Board's commerce jurisdictional standards." Ecclesiastical Maintenance Services, 320 NLRB 70 (1995) (declining to issue an advisory opinion on whether employer was a religious-affiliated institution and, accordingly, whether the Board would assert jurisdiction). The issue here, whether the enterprise is primarily a racetrack or casino, involves the enterprise's impact on interstate commerce. See Section 103.3 and footnote 4, infra. Accordingly, the issue is appropriate for an advisory opinion under subparagraph (1) of Section 102.98.6

If, as the Employer contends, its enterprise is now essentially a casino operation, then the Board would apply its retail standard to ascertain whether the volume of the Employer's business is sufficient to bring it within the Board's discretionary jurisdiction. *El Dorado Club*, 151 NLRB 579 (1965); *Harrah's Club*, 150 NLRB 1702

⁴ See Sec. 103.3 of the Board's Rules and Regulations, which provides that "[t]he Board will not assert its jurisdiction in any proceeding under sections 8, 9, and 10 of the Act involving the horseracing and dogracing industries." The Board has adopted this policy pursuant to Sec. 14(c)(1) of the Act, which provides that

The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employees, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction [Emphasis added.]

The Board has declined to assert jurisdiction over racetracks based on its judgment that disputes arising from employment at such enterprises do not, on balance, have such impact. See Sec. 103.3 of the Board's Rules.

⁵ The Board's Rules impose certain formal requirements on petitions for advisory opinions. The instant petition satisfies these requirements.

⁶ With respect to subpar. (2) (statutory jurisdiction), it is clear that the Employer falls within the Board's statutory jurisdiction, which, subject to the explicit exceptions set out in Sec. 2(2) of the Act, extends to all enterprises affecting commerce. Thus, regardless of whether the Employer's operation is viewed as primarily a racetrack or primarily a casino, it falls within the statutory jurisdiction of the Board. Moreover, the Board regularly asserts jurisdiction over enterprises engaged in casino gambling. See, e.g., Riverboat Services of Indiana, 345 NLRB 1286 (2005); President Riverboat Casinos of Missouri, Inc., 329 NLRB 77 (1999); Bally's Park Place, 255 NLRB 63 (1981); Club Cal-Neva, 231 NLRB 22 (1977) enfd. sub nom. NLRB v. Sierra Development Co., 604 F.2d 606 (9th Cir. 1979).

(1965), enfd. 362 F.2d 425 (9th Cir. 1966), cert. denied 386 U.S. 915 (1967). However, if the enterprise remains primarily a racetrack operation, the Board would not assert discretionary jurisdiction.

We agree with the Employer that, as a result of the changes resulting from the addition of its casino gambling operations, the enterprise is no longer primarily a racetrack, and that the Board's policy of declining jurisdiction over racetracks no longer applies to it. In two recent published cases, the Board considered combined casino and racetrack operations with histories similar to that of the Employer's enterprise. In each case, the Board found that although the enterprise began life as a racetrack and added casino operations later, the revenue and employment generated by the casino so overshadowed those generated by the horseracing operations the enterprise was no longer "essentially a racetrack," Prairie Meadows Racetrack & Casino, 324 NLRB 550, 551 (1997), and "the racetrack was dependent on the casino, not the other way around." Delaware Park, 325 NLRB 156, 156 (1997).

In Prairie Meadows, supra, the Board ordered elections in three bargaining units, including a unit of skilled and unskilled employees who maintained and repaired the building containing the casino operations and the seating for racing patrons.8 Prior to the addition of casino gambling, there were 375 employees, with only 125 employed year round. After the addition of casino gambling, the number of employees rose to 1300, with 1050 employed year round. None of the employees were jockeys, trainers, grooms, or parimutuel betting agents, classifications that the Board had excluded from the protection of the Act under Section 103.3. The Board concluded that the Prairie Meadows enterprise was "predominantly a casino and the employees are predominantly casino employees. In these circumstances, Section 103.3 of the Board's Rules and Regulations does not apply." Id. at 552.

In *Delaware Park*, supra, the Board followed *Prairie Meadows* to assert jurisdiction over another racetrack that received significant revenues from slot machines.

As in *Prairie Meadows*, the casino operation brought with it a significant increase in the number of days the facility was open (from 5 hours per day, 139 days per year to 13–18 hours per day, 363 days per year).

Here, it appears from NYSERB's factual findings that the Employer's operation has undergone similar changes resulting from the addition of casino gambling. The number of employees has increased from 205 to 1300 and its hours of operation each day have more than doubled, from 7.5 to 16. As in *Prairie Meadows* and *Delaware Park*, the casino gambling side of the Employer's business has come to so dominate the operation that the operation is primarily a casino operation with a racetrack attached, rather than vice versa.

Accordingly, the Board is of the opinion that the Employer's operation is primarily a casino and the racetrack exception is not applicable. As noted above, the Board applies the retail standard to casino operations. The Board's current standards provide that it will exercise discretionary jurisdiction over all retail enterprises falling within its statutory jurisdiction and with a gross annual volume of business of \$500,000 or more. Carolina Supplies & Cement Co., 122 NLRB 88 (1959). NYSERB found that, in 2008, the Employer's racetrack/casino operation had combined revenues of approximately \$179 million, well in excess of the dollar-volume test in the Board's retail standard. Therefore, the Board's opinion is that the Employer's operation has sufficient impact on commerce that the Board would not decline to assert discretionary jurisdiction over it.9

Dated, Washington, D.C. May 24, 2010

Wilma B. Liebman,	Chairman
Peter C. Schaumber,	Member
Craig Becker,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

⁷ We emphasize that our Opinion is based solely on the facts set out in the NYSERB report, and that a full inquiry into the Employer's operations that would occur in a representation or unfair labor practice proceeding could lead to a different result. Further, our Opinion does not address any issue other than the likelihood that the Board would assert jurisdiction over the Employer's enterprise. For example, this Opinion expresses no position as to the appropriateness of the unit involved.

⁸ The Board also ordered elections in another unit of employees who worked exclusively in the casino, e.g., cashiers and slot machine attendants, and in a unit of employees who worked predominately in the casino, e.g., housekeepers and kitchen and banquet employees.

⁹ Significantly, the Employer does not suggest that the Board should abandon or revise its practice of declining jurisdiction over racetracks. Such an argument would not be appropriate for consideration in a nonadversarial advisory opinion, and the Board has refused to address it in the advisory opinion context. See, e.g., *Pari-Mutuel Clerks Union of Louisiana Local 328 (Jefferson Downs)*, 267 NLRB 174 (1983) (reconsideration of policy of declining jurisdiction over racetracks does not fall within the parameters of the advisory opinion).

We note that, as in *Prairie Meadows* and *Delaware Park*, the employees at issue here do not belong in classifications that the Board has previously declined to protect under Sec. 103.3.